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# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1744

TITLE THOMAS J. HENDERSON, SCOTT O. THORNTON AND RUTH FREEDMAN, Petitioners V. UNITED STATES

PLACE Washington, D. C.

DATE April 1, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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THOMAS J. HENDERSON, SCOTT C. :
THORNTON AND RUTH FREEDMAN, :
Petitioners, :
V. : No. 84-1744
UNITED STATES :

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Washington, D.C.

Tuesday, April 1, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:41 o'clock p.m.

APPEARANCES:

DENISE ANTON, ESQ., San Francisco, California; on behalf of the petitioners.

ROGER CLEGG, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the respondent.



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C O N T E N T S





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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Henderson, Thornton, and Freedman against the United States.

Ms. Anton, I think you may proceed when you are ready.

ORAL ARGUMENT OF DENISE ANTON, ESQ.,

ON BEHALF OF THE PETITIONERS

MS. ANTON: Mr. Chief Justice, and may it please the Court, this case involves the question of how the pretrial motion exclusion of the speedy trial action be applied. This exclusion of Section 3161(h)(1)(f), Subsection (f), excludes from the 70-day period in which the defendant must be tried under the Speedy Trial Act, delay resulting from pretrial motions, the statutory language reads "delay resulting from any pretrial motion from the filing of the motion to the conclusion of the hearing on or other prompt disposition of such motion."

The deceptively narrow issue presented in this case is what is the scope of this exclusion. Does it exclude only reasonable delay? Does it exclude all delay? And at what point does the automatic exclusion end? This narrow question cannot be answered, however, without addressing and resolving the issue of whether the Speedy Trial Act is going to have the effect of



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expediting criminal cases that Congress clearly intended when it passed this legislation.

Congress passed the Speedy Trial Act because it was dissatisfied with the way that courts were interpreting the Sixth Amendment. It was dissatisfied with the way that the participants to the criminal justice system were processing their criminal cases, so it passed legislation which it certainly intended would have some sort of an effect on the status quo which would require the parties to move at a pace at which they were not moving.

How this Court interprets the pretrial motion exclusion will determine whether Congress was at all successful in its efforts. This particular case is an excellent vehicle for considering this question since it involves a delay of over 789 days from the point superseding indictment until the defendants were ultimately brought to trial.

This is not a case where we are talking about one or two days of delay that are at issue. Depending on how the Court interprets the pretrial motion exclusion, literally hundreds of days will either become automatically excludable or nonexcludable as far as the Speedy Trial Act computations.

But the true issue involved in this case



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really transcends the facts of this particular case, because it is clear that the pretrial motion section of the Speedy Trial Act lies at the very heart of the Speedy Trial Act. Virtually every criminal case that comes to court is going to involve filing some pretrial motions, and how this Court interprets this section will resolve how all these cases will be processed, virtually every criminal case in the federal courts. This Court is presented with --

QUESTION: Ms. Anton, may I ask you whether you would agree that the legislative history of this thing suggests that Congress thought the circuits themselves would police the requirements under these rules to provide some guidance to trial courts to set times within which the motion should be resolved rather than to think that Congress itself was imposing an overall time limit?

MS. ANTON: I have no dispute with the government or the Ninth Circuit in this case that Congress intended that local guidelines be developed. I do not agree that Congress intended that the viability, the effectiveness of the Act would rest solely with the development of local guidelines.

If that were the case, I don't believe they would have had any need to enact this legislation since



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Rule 50(b) of the Federal Rules of Criminal Procedure at least provided that local guidelines should be adopted for the prompt disposition of criminal cases.

If Congress believed that the local guidelines were effective and were addressing the problem that it perceived, it would not have enacted this legislation.

QUESTION: Well, in your view, just exactly when did the prehearing delay in this case become unreasonable?

MS. ANTON: This case presents numerous examples, I think, of the kind of excessive delay that should not occur in a criminal case.

QUESTION: Well, can you pinpoint a single time when you think it is clear that the time became unreasonable and the government should have known at that time?

MS. ANTON: I think that the clearest example, the most illustrative situation is the delay that occurred in this case following the hearing on the pretrial motions. The pretrial motions were held in this case on March 25th, 1981.

That was approximately four months after the first motion was filed. Regardless of whether the period of delay from the filing of the motion until the hearing was considered reasonable, the period of time



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that was excluded by the Ninth Circuit under Subsection (f) following the hearing was, I believe, totally unreasonable.

QUESTION: You say it was unreasonable. One gets the impression from reading the briefs and the opinions of the Ninth Circuit that at the conclusion of the hearing in the District Court the District Court was allowing the record to remain open because there were further factual submissions to be made.

MS. ANTON: Well, the governmnent -- we differ as far as how many really -- how many issues really remained unresolved. The one that is clear that remained unresolved was the issue of whether defendant's request for an evidentiary hearing should be granted. That motion was filed in November of 1980.

The government responded to that motion in February of 1981, and basically said, regardless of what the defendants have argued -- it was a motion claiming that there were misstatements in a search warrant affidavit -- the government's attitude was, regardless of whether these statements are true or not, we don't believe that a hearing is required.

For the first time at the hearing on March 25th, another month and a half later, the court -- the government stated, well, we have changed our mind about



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how we want to respond to this motion, and I would like an opportunity to obtain information which will show that in fact there were no misstatements in the affidavit.

I think that that is unreasonable that she raised that issue at that late date. Whether she in fact should have raised it at that date, she said at the time of the March 25th hearing that she believed that she would have the information by the end of the week.

She in fact waited three months before providing the information, and she never stated her -- she never asked for more time, she never stated that there was some reason why more time was necessary, and the court made no attempt to monitor this situation.

Our position is that what should have occurred at that hearing if it was reasonable to give the prosecutor any more time at all. In any event, which we do not think that that was reasonable, is that the court should have said that additional time is necessary, how much time do you think you need, and the prosecutor would have said, I think I need ten days, or I need two weeks, and the court would have said, fine, I will grant you this two-week period of time, and you will respond within that period of time, and if you don't respond, tell me why, or I will proceed and rule on the motions

based on the reply that you filed two months ago.

I think that what should happen, especially at the point of a hearing, is that any delay occurring after the hearing should be justified under the ends of justice exclusion, continuance exclusion that is found within the Speedy Trial Act. I think this is a similar analysis to that that this Court took in the Rojas Contraras case, the recent Speedy Trial Act case that this Court considered.

QUESTION: Of course, it doesn't really fit in under the continuance section, does it, I mean, the sort of delay attending the hearing and disposition of the motion.

MS. ANTON: No, I think that it probably would. It would be in the interest of justice to allow the prosecutor to prevent additional -- to present additional information which would resolve the hearing.

QUESTION: Well, you know, in drafting the statute, I certainly think you could make that argument, and perhaps it would be very persuasive, but just the way this statute is drafted, it seems like the ends of justice is limited to your continuance of trial situation.

MS. ANTON: Well, that isn't how I exactly read the Rojas Contraras case. In that case this Court



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held that the 30-day preparation period during which the defendat cannot be brought to trial does not begin anew with the filing of the new superseding indictment. The Court found that this does not mean that more time might not be necessary because of the filing of the new indictment, and the Court explicitly suggested that the courts, that the trial courts or the parties resort to the ends of justice continuance if it needed more time.

QUESTION: But that again is continuance in the traditional sense of the word that Rojas Contraras referred to, wasn't it, the continuance of a previously set trial date?

MS. ANTON: Well, it would be a similar situation, I think, under the pretrial -- our opinion, to begin with, to step back a little bit, in our opinion, the language of the Subsection (f) exclusion could not be plainer. There is absolutely no ambiguity that the pretrial motion exclusion ends when there is a hearing conducted on pretrial motions, at the conclusion of the hearing on pretrial motions.

QUESTION: Ms. Anton, how many times did you try to get this case moving by form of a motion of any kind?

MS. ANTON: We have not -- there is nothing in the record that indicates that the defendants made a



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formal objection --

QUESTION: Don't you think you had some responsibility?

MS. ANTON: No, I -- oh, I think that under the statute there is clearly no responsibility. It is a mandatory statute if the time constraints --

QUESTION: Well, have you ever heard of one sleeping on one's rights?

MS. ANTON: Well, there is no question but that the defendants in this case wanted the court and wanted the prosecutor -- the motions were essential to this case. There is no question. And they wanted all parties to take them seriously, and if the parties were in fact considering the motions, if they were pondering difficult legal issues --

QUESTION: Aren't there cases where a defense would have a delay or would like to have it --

MS. ANTON: Certainly.

QUESTION: -- in the trial of a criminal case?

MS. ANTON: Certainly, but the Speedy --

QUESTION: And if you sit idly by, can't somebody assume that that is what you are doing?

MS. ANTON: This is not a situation where because of the defendant's idleness delay occurred.



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This is a situation where the court and the prosecutor failed to do certain things that they not only have an obligation to do but which they said they would do, and the defendant in a criminal case certainly has enough responsibility in defending against the charges that he should not also take on the responsibility of monitoring the court and the prosecutor.

It is not a situation where the defendants just failed to file the information. This is a situation where the government waited three months, when it said it would have information within a week, and just practically speaking, for the defendant to bear the responsibility of moving his case along, of requiring the judge to monitor the cases, of trying to control the judge's calendar, I don't think that is a responsibility of the defendant, and I don't think it should be the responsibility of the defendant.

And as I said, I think that the defendants wanted the court to consider the motions, and if the court were considering the motions, the defendant had no desire to cut that short. In fact, it was not apparent until the court issued its order ten months later that it was not using that time to consider the motions at all. The only issue he addressed in his order that he finally filed was the one issue that was fully submitted

at the time of the hearing. He never addressed the issue that the court -- that the prosecutor wanted to present additional information on.

QUESTION: Can you give me a little help? The period of dispute, as I understand, is primarily the period after the hearing on March 25th, 1981, and I gather the government argues the motion really wasn't submitted until, I think it is December 15th of '81, because there were a number of filings that took place.

Is it your view that after March 25th, 1981, say there was a clear understanding that the government filed something more in 15 days, and they did file it within 15 days. Would that 15 days be excludable or not under your view?

MS. ANTON: In our view, the pretrial motion, the automatic exclusion for pretrial motions ends at the time of the hearing.

QUESTION: Of the hearing, right.

MS. ANTON: If the court had said, if it were apparent from the record that additional time was reasonably necessary, and it was apparent from the record that a specific period of time was being set --

QUESTION: Say you both wanted to file written submissions to make it easy, and they filed something in writing concerning, and then the judge at the end of the

15 or 20 days after the first argument said, I will now submit it. Would you not agree that the hearing really wasn't concluded until those additional filings were made?

MS. ANTON: No, but I would agree that what had happened would be sufficient to create a continuance, an ends of justice continuance, so that it would be excludable under that situation.

QUESTION: Would the judge have to make a special finding in your view that we need an extra 15, 20 days for papers to be filed, therefore I will make a finding that the ends of justice will be served?

MS. ANTON: I think that is how the Speedy Trial Act should work. I think that implicit --

QUESTION: Do you find that in the statute, though, that kind of a procedure?

MS. ANTON: I think you find specifically in the statute that the court is to take control, that the court is to immediately try to set a trial date. That is the first --

QUESTION: I understand, but you are concerned with the problem, a trial judge has to decide these pretrial motions. He has a hearing, and everybody says, I guess I had better take somebody's deposition, or I ought to file a brief, or call the court's attention to



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some authorities.

Is it your view the hearing is over even though there are going to be more papers filed directed at the matter the judge is to be deciding?

MS. ANTON: Yes.

QUESTION: It is?

QUESTION: Even if the judge says, this hearing will not conclude until this further material is presented, and I suppose if your rule were in place, what the judge would say, this hearing is continued until -- for six weeks, and then you all appear here and we will continue the hearing.

MS. ANTON: I think all the judge needs to do is make it clear that time is necessary, and say what time that is. The problem is, in this particular case, the court said -- the court didn't say anything. The prosecutor said, I will have the information by the end of the week. She waited three months before filing that information.

Under the government's and the Ninth Circuit's interpretation of the statute, that delay is excludable. It is not only excludable, it is automatically excludable, and not subject to review.

QUESTION: Do you have some controlling principle you want to apply here? There are some courts



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who -- what do they do, they apply a reasonable necessity rule?

MS. ANTON: Our position is that the period from the filing of the motion until the hearing on the pretrial motions should be subject to a reasonableness standard.

QUESTION: A reasonable what?

MS. ANTON: A reasonable -- that only reasonable delay should be excluded, that unreasonable delay is not covered by the statute.

QUESTION: Suppose after those six days you had notified the judge, who has got a very active calendar, I assume, and said, hey, judge, they said they would have this in in six days, and it is not in. What do you think would have happened?

MS. ANTON: In this particular case?

QUESTION: Yes.

MS. ANTON: I really don't know what would have happened.

QUESTION: Do you think the judge would ignore it? And if so, why?

MS. ANTON: Well, because in July, the -- because the court did not seem to make an effort to move the case along in any way. When things were --

QUESTION: Didn't he take as much effort as



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you did?

MS. ANTON: No, I do not think that is true.

QUESTION: What did you do?

MS. ANTON: We complied with everything that the statute requires.

QUESTION: What did you do during that period of time? You said you didn't file anything.

MS. ANTON: We waited for the court --

QUESTION: You did the same thing the judge did, which was nothing.

MS. ANTON: No, but the court had said at the end of the hearing on March 25th, I will take these under submission. I will rule on them promptly so that we can get on with the case, and when I have ruled on it, I will schedule a court appearance and call you in and we will set a trial date. He did not mean for another ten months, and he did not set a trial date for another 13 months, and that was the obligation and the responsibility of the court. It is not the defendant's obligation.

Even in the Sixth Amendment context this Court in the Barker v. Wingo case said it is not the defendant's obligation to bring himself to trial. It is the obligation primarily of the government, and certainly of the court, and I don't think that that



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burden should be shifted to the defendant, and clearly under the statute it is not. It is an automatic mandatory dismissial if there has been a violation.

It may be pertinent to whether the case should be dismissed with or without prejudice, but it is not pertinent to whether there has been a violation, and this is also true because the Speedy Trial Act was passed not only to protect the defendant's rights, it was passed to protect society's rights, and certainly the protection of society's right to a criminal trial cannot be left to the defendant's demand.

The defendants did everything that they were and could have done as far as their obligations of filing the motions --

QUESTION: None of these motions were dispositive, were they? Even if you had won the motions there was going to be a trial.

MS. ANTON: Not necessarily. There were various Fourth Amendment motions to suppress.

QUESTION: Well, I know, court suppression of evidence.

MS. ANTON: I believe that they would have been dispositive, yes. And as I said --

QUESTION: Well, usually defendants, if there is going to be a trial anyway, defendants usually aren't



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in such a great hurry.

MS. ANTON: Defendants thought these motions would be dispositive. They thought they were not frivolous motions. They were good motions, and I think they wanted everyone to give them due consideration, and to the extent that they believed that the court was giving them due consideration, they were not going to go and antagonize the judge in any way by saying that he was not being responsible, or he was not ruling on the case, or not monitoring the case in any official way. That is just -- practically the defendants cannot be forced to take that position. But --

QUESTION: Looking at it from that angle, that you don't want to antagonize the judge, I suppose the prosecutor must feel the same way.

QUESTION: Don't try the case.

MS. ANTON: All I am trying to say is that the defendants do not have this burden of forcing the judge and forcing the prosecutor to meet their obligations. It may be nice if they take that responsibility, but it is certainly not placed upon them, and it should not be placed upon them in the context of the criminal justice system.

QUESTION: But certainly it can't be a reason for the fact that it is not -- that you can't ask a



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defendant's attorney to antagonize the judge.

MS. ANTON: I am not saying that is a reason. I am saying as a practical matter it is very difficult for a defendant awaiting a ruling from a trial court to be forced to tell the judge that he does not believe that he is ruling on it in a prompt fashion, especially when it is not apparent that the judge is not considering the motion until after the fact.

If he is in fact considering the motion, there is no reason why the delay should not be excludable. But we find that regardless of whether the court determines that the pretrial motion ends at the time of the hearing, there is a reasonableness standard that must be applied both before the time of the hearing and after the time of the hearing, and that reasonableness standard is not found solely in the purpose of the Speedy Trial Act, which is to ensure a speedy trial. It would be ground, our interpretation, on the language of the pretrial motion exclusion, which states that the exclusion ends at the time of the hearing or other prompt disposition.

I read that language to say quite clearly that prompt modifies all dispositions, including a disposition by hearing. One could not reasonably --

QUESTION: That isn't an inevitable reading of



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the provision.

MS. ANTON: I think if one considers it for a while, it is. One would not say the conclusion ends until the unreasonably delayed hearing or other prompt disposition. It doesn't make sense. It is as if saying --

QUESTION: Well, there may be dispositions other than by hearing, those that don't require a hearing.

MS. ANTON: And those should be prompt. It doesn't say hearing or prompt other disposition. The prompt disposition, a hearing is a subset of prompt disposition. It is like saying diamond or other precious stone. One would not say pebble or other precious stone, because it is not a -- it is a stone, but it is not a precious stone.

I believe that the way that the sentence is constructed, that prompt applies to both or to all dispositions, whether it be by hearing or otherwise, and I think if there is any question about that, one only needs look at the Senate report, the Senate committee report, where there is a paragraph where they specifically discuss the other prompt disposition language, and it continues on, and ends with the final sentence, that "Nor does this committee intend that

additional time be made eligible for exclusion by postponing the hearing date or other disposition of the motions beyond what is reasonably necessary."

QUESTION: In case you don't see it, your warning light is on now.

MS. ANTON: I do. I just saw it. Thank you.

We believe that that excerpt demonstrates that Congress intended that the prompt disposition language apply a reasonableness limitation not only to the time pending other dispositions, but also to the time pending hearings.

Unless there are any other questions, I will save the rest of my time.

CHIEF JUSTICE BURGER: Mr. Clegg.

ORAL ARGUMENT OF ROGER CLEGG, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. CLEGG: Thank you, Mr. Chief Justice, and may it please the Court, this case involves the meaning of a particular section of the Speedy Trial Act. In determining the meaning of a statute, the courts have always looked first to its plain language, which petitioners hardly mentioned today, and they have also considered its legislative history and whether a given interpretation will make the statute unworkable.

The point that I want to make today is that



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whichever of these three guideposts are looked to, lanuage, legislative history, or practical effect on the statutory goal, the same conclusion should be reached. The petitioners' trial and convictions met the requirements of the Act. The Court of Appeals' decision should therefore be affirmed.

The time period specifically in question here is from November 3rd, 1980, through September 14, 1981. The United States contends that all of this time is excludable under the Act. As we have seen by their inability to respond to Justice O'Connor's question, petitioners do not specify exactly how much of it they think is excludable, but they do argue that enough of it was nonexcludable that the Act was violated.

The time period in question is divisible into two parts, the part from November 3rd, when petitioners filed their first pretrial motion, until March 25th, when the judge held a hearing on their motion, and the part after March 25th.

Petitioners argue that some unspecified amount of time before the March 25th hearing was not reasonably necessary for holding a hearing. I had understood them to be arguing in their brief that once the hearing was held, the Speedy Trial Act automatically started ticking again, even though the trial judge had requested



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additional information and had not yet taken the motion under advisement.

Today, though, it appears that petitioners believe there is a reasonable necessity requirement in the post-March 25 period as well.

Without going into all the motions and continuances filed in the disputed period, I think that any fair reading of the record makes clear two things. The first is that there were a lot of claims that petitioners wanted resolved as a pretrial matter. As they said, they considered this very important to the case.

Second, as Justice Marshall has pointed out, petitioners were in no hurry to have their claims resolved. They pursued them zealously and thoroughly. I make these two points not because they somehow estop petitioner's claim of a Speedy Trial Act violation, but they should be kept in mind because they illustrate a common occurrence.

Defendants, particularly in cases involving drugs or other contraband, will typically raise a lot of pretrial issues, and want to have them seriously and carefully considered by the trial judge. It is safe to say that in many cases resolution of these issues decides the case.



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Petitioners confirm all this today. It would not be unusual for the claims to be at least as complicated as those raised here. This is an important point, because, as I hope to discuss more later, the construction of the Speedy Trial Act petitioners urge will make the Act unworkable, will encourage trial judges to give these pretrial motions short shrift, and will necessitate constant appellate second-guessing of how trial judges set priorities, schedule, and otherwise handle their dockets.

QUESTION: You mean he might rule for the government very quickly?

MR. CLEGG: Well, actually --

QUESTION: Or whatever --

MR. CLEGG: -- two things can happen, and I argue either one of them will be bad. Either -- I mean, assuming that they rule incorrectly. If they are hastened into ruling for the defendant, of course, that is bad for the government. Even if they rule very precipitously in the government's failure -- in the government's favor, if that is reversed on -- that also defeats the purpose of the Speedy Trial Act, because we have to go through the whole exercise again.

QUESTION: Where in the Act -- is there a requirement that the defendant make any motion of any



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kind?

MR. CLEGG: No, there is not, and that is why I say that the point I am making is not that the Act --

QUESTION: Well, did you promise the court that you would have this information --

MR. CLEGG: No.

QUESTION: -- within six days?

MR. CLEGG: I think that is an overstatement. In the Joint Appendix, at Page 53, we said that we were going to try to get it by the end of the week, but we made clear that that was only going to be an effort. In fact, there was some difficulty --

QUESTION: Well, did you comply with what you said? Did you do it?

MR. CLEGG: What we said was that we would use our best efforts to get it by the end of the week, and we did comply with that, yes.

QUESTION: And when did you file it?

MR. CLEGG: Well, there were actually two bits of information that we were supposed to get.

QUESTION: When did you file it?

MR. CLEGG: One one month from the hearing, one two months from the hearing.

QUESTION: And you think that you fulfilled your duty to the court?

MR. CLEGG: Yes.

QUESTION: You do?

MR. CLEGG: Yes.

QUESTION: You promised him six days, and you took two months.

MR. CLEGG: We didn't promise in six days. We said that we would do our best to get it by the end of the week, and unfortunately we weren't able to do that, but we did get it as quickly as we could.

QUESTION: Well, is it the government's position that there is just no limit at all on the delay between the filing of a motion and the hearing? Or how long the hearing takes?

MR. CLEGG: Well, the government --

QUESTION: Can a judge just adjourn a hearing in the middle of it and say, I am going to play golf for a couple of weeks, and will come back and continue the hearing a month from now?

MR. CLEGG: The statutory scheme that Congress envisioned was one where any time limits on when a hearing is supposed to be held and when the papers in connection with the hearing are supposed to be filed and all of that are supposed to be made by court rule, as Justice O'Connor pointed out.

Congress in fact knew that without the court

rules there would be a loophole in the Act. Now, this is discussed in the paragraph on Pages 30 to 31 of our brief.

In this regard, I should stress that the court rules are central to the Act. More than half --

QUESTION: How about answering my -- are you getting around to answering my question, I guess?

MR. CLEGG: No, I mean --

QUESTION: No?

MR. CLEGG: The answer to your question is yes, if the judge did that, and there were no local rules, that time would be excludable.

QUESTION: Just no -- however unreasonable the delay might be.

MR. CLEGG: That's correct, because what Congress had in mind was that the uneasonable --

QUESTION: I suppose you have to take that position in this case, too.

MR. CLEGG: I don't think that the facts in this case are particularly egregious, and in fact we would argue in the alternative, that the time taken by the judge here to rule was reasonably necessary. But to answer your question, yes.

QUESTION: Is there any barrier to the defendant raising the question to a judge who might be



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going off, if there are such, to play golf for six weeks?

MR. CLEGG: Absolutely not.

QUESTION: You can go to the chief judge of the court or the chief judge of the circuit, can you not?

MR. CLEGG: That's correct. That's correct. And of course none of that was done here.

QUESTION: You say there are rules, court rules that normally take care of this anyway.

MR. CLEGG: Well, they should, yes. And --

QUESTION: As I understand your position, the issues would be the same even if they filed 1,000 motions saying please decide this tomorrow, please decide this right away. That wouldn't have helped him, would it?

MR. CLEGG: Well, it --

QUESTION: Your position is, the time is flatly excludable, I think.

MR. CLEGG: That's correct, but I think that, as I understood the Chief Justice's question was that if there really is a difficulty or an abuse, there are, in addition to the court rules, the litigants themselves have certain protections that they can avail themselves of, and in this case they didn't.



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QUESTION: What was so difficult that it took two months? What was it you filed?

MR. CLEGG: Well, the issue was some telephone toll records. We had -- in our affidavit that was attached to the search warrant the agent had said that one of the defendants had made several phone calls to another one of the defendants. We had -- and he relied on records of, I believe it was a Holiday Inn, which said that the room where one of the defendants was staying had reported several phone calls to this other defendant.

The delay took place because, first of all, we -- well, because we were trying to get material not only from the Ohio phone company but also from the Holiday Inn, and we had some difficulty doing that.

QUESTION: This was about a couple of phone calls?

MR. CLEGG: That's correct.

QUESTION: It took two months?

MR. CLEGG: That's correct.

With regard to the court rules, I should say that more than half of the sections in the Speedy Trial Act involve these district plans, and the Act requires that the administrative office of U.S. courts report to Congress about the plans and about suggested legislative



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changes.

This court rule approach makes the most sense, because the case loads will vary. The major point that I wanted to make with regard to the workability of the statute and how the government's interpretation is one which ensures that the statute will remain workable and the petitioners is one which will make the statute unworkable really has three separate points.

The first point is that the Act cannot work unless everyone knows ahead of time when the clock will start and stop. Courts and prosecutors have to be able to set time priorities for their cases, and have to know when to seek an ends of justice continuance, and they have to know generally how much time they have. You can't make that sort of calculation under petitioner's standard.

As the Second Circuit has said, by its nature that standard is retrospective. Presumably this insertion of reasonably necessary language into Section (f) would also apply to all the other sections in Section (h)(1).

Second, the retrospective nature of this standard ensures that there will be a great deal of appellate second guessing of how trial judges manage their dockets. On Page 35 of our brief, we list some of



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the appellate litigation that has already been spawned in those circuits which have adopted this standard.

And third, the standard that petitioners urge will encourage courts to give short shrift to pretrial motions. In this regard, their post-March 25 argument also leads to a bad result, because judges will be discouraged from asking for post-hearing material, and prosecutors will be discouraged from offering it. Ironically, this is all probably going to do more damage to defendants than to the prosecution, but the whole system will really suffer.

The reversals that will result, as I said before, will not result in speedier trials, either.

Petitioners' response to all this, which you have heard today, is a superficial argument that amounts to saying that since their interpretation will panic and confuse everyone into moving precipitously, that that will speed up trials, and that that will further the spirit of the Speedy Trial Act.

Congress did not intend to sacrifice everything for speed. The government's interpretation of the Act best serves prosecutors, defendants, and courts alike. Courts will not be speeded up if they don't know how fast they are supposed to go. The government's interpretation of the Act makes it coherent



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and workable. The clock stops when the pretrial motion is filed.

QUESTION: Well, you say it makes it coherent and workable, Mr. Clegg. Certainly it confirms the idea in one part of the legislative history that this would be a great big loophole in the Act.

MR. CLEGG: Well, that loophole is supposed to be filled by court rules.

QUESTION: Yes, not that nothing can be done about it, but everything else is kind of pushed along, but one of the classic causes of litigation delay, judges sitting on things that are under advisement for too long, is that it is just left unremedied.

MR. CLEGG: Well, I think that the --

QUESTION: Well, I thought the rule expressly limited the time that something could be held under advisement to 30 days, and what we are talking about is the provision for the conduct of a hearing, and we say under the rule, it is your position that that doesn't run so long as all the documents necessary to resolve it had not been submitted. It was my understanding once they are all submitted there is a 30-day limit.

MR. CLEGG: That's correct, Justice O'Connor. Thank you. That is Subsection (j), which says that once the motion -- once the papers are all in, then the judge



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has 30 days from that period.

QUESTION: So this situation arises only when either one of the parties at the hearing on the motion says, I want to submit something more, and the judge agrees, or the judge says, I want more material from you, and the parties agree to supply it.

MR. CLEGG: That's right. The government's interpretation will, I think, fit Section (j) and Section (f) together very well. The clock stops when the pretrial motion is filed, and it doesn't start up again until the judge has everything he needs to make a ruling. Then the under advisement section kicks in, and he has 30 days to make his decision.

QUESTION: What about our golf-playing judge that was previously hypothesized? And the end of the hearing on the motion, nobody says, I am going to submit more materials, and he doesn't ask for any more, but he simply does not say it is submitted, he doesn't say I will take it under advisement. Then 60 days later he sends around a notice to the parties, I have just taken this motion under advisement.

MR. CLEGG: In that situation, I think that if it is -- in the first place, if it is objectively clear that he is expecting more information, then we don't have that problem.

QUESTION: No, let's say it is objectively clear he isn't expecting more information.

MR. CLEGG: The government's position in that situation is that the time is excluded until he gets everything he needs to rule on the motion, and if there is a 60-day delay while he is playing golf, that is an abuse that has to be addressed by court rule.

The court rules will ensure that the timing is consistent with the Act regarding filing the motion, responding to it, holding hearings.

QUESTION: You mean, having a court rule that the judge is supposed to live up to. Is that it?

MR. CLEGG: That's right.

QUESTION: And what if he doesn't?

MR. CLEGG: Well, if he --

QUESTION: Then the judicial council is supposed to get after him?

MR. CLEGG: That's right.

QUESTION: But not -- it doesn't affect the criminal case.

MR. CLEGG: Well, if a local rule says that the judge is supposed to rule the next day --

QUESTION: Well, suppose the local rule says that there is going to be no more delay between the filing of a motion and a hearing than is reasonably

necessary, and hearings will not last any longer than reasonably necessary. Then what? Then this happens. The judge goes off and plays golf between the filing of motions and the hearing.

MR. CLEGG: The whole point of the court rules is to make precise what these deadlines are supposed to be. In other words, what a court rule should have, and what -- the kind of court rules that Congress endorsed in the legislative history are ones like the judicial council for the Second Circuit had, where there are actual, you know, ten-day or fifteen-day deadlines that are set. In that case --

QUESTION: Then the clock really starts and stops according to those rules?

MR. CLEGG: That's right. If the local rule is violated, then the petitioners have the same recourse that they would have whenever a local rule is violated. And, of course, if it resulted in a Speedy Trial Act violation, then they would still be able to challenge their convictions in that regard.

QUESTION: May I ask you one question to be sure I understand your reading of the statute? Is it your view that the period between the hearing when the arguments took place on March 25th of '81 and I think it is December 15th, '81, when the final paper was filed,



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and the judge took it under submission, that we should treat the period right up to December 15th, 1981 -- December 15th, 1981, as the date the hearing concluded within the meaning of the statute?

MR. CLEGG: That's correct. That is the time that is excludable under Section (f).

QUESTION: But you do it by treating post-hearing submissions as though they were actually a continuation of the hearing itself.

MR. CLEGG: That's correct, and again, I think that the legislative history and the structure of the Act with respect to Subsection (j) bears that out. The idea was that here again, this is also something that the Second Circuit judicial council had adopted, that the clock is stopped until -- once a pretrial motion is filed until the judge gets everything that he needs to rule on that motion.

When that happens, he has -- Subjection (j) kicks in, and he has 30 days.

QUESTION: Then, may I ask, is it correct that the case really boils down to the question whether the word "prompt" in Subsection (f) not only modifies this position but also, as your opponent contends, modifies the word "hearing" that precedes? Isn't that what we really have to decide? Because if it does -- I know you

alternatively argue that the time was reasonable, but the basic issue we have to decide is that. Is that correct?

MR. GLEGG: Well, I think that that oversimplifies it somewhat. Let me answer that as briefly as I can, but it is going to require a little -- I think first of all we have to divide the time period here into two parts. There is the part up to March 25 when we have the hearing, and then there is the part after it.

QUESTION: That's what I don't understand. If you agree that the hearing really didn't conclude until December 15th, I am not sure why you have to divide the period. That is really what prompted my question.

MR. CLEGG: Well, I think that the -- focusing on the word "prompt," first of all, you are correct that -- the first point is that it doesn't modify hearing, and that is, I think, consistent with the legislative history, as we discuss on Page 23 of our brief.

Second, prompt in any event doesn't mean reasonably necessary. All it does is tie Subsection (f) in with Subsection (j), and stop the clock until the motion is under advisement.

We would also say that again you can't look at even Section (f) in a vacuum. You need to look at the

rest of Section (h) as well, which makes clear, and the legislative history makes clear that the things that are listed in Section (h) are automatic exclusions, as they are referred to in the legislative history.

And I think that Section (h) begins by saying, you know, any period of delay, and I should also point out that "reasonable" appears elsewhere in (h), but not in the part we are talking about, and the other parts of (h) have absolute limits, which we don't have here, too.

The other result that petitioners' reading of the Act would have would be to have a very artificial distinction between motions that are decided with hearings and those that are decided on the papers. The effect of that is something that I think Congress also clearly had no reason to effect.

I guess the final point that I would make in terms of just the plain statutory language is that (h)(1) itself makes clear that the list is follows is not an exhaustive list, and we would argue that something like including in excludable time the time necessary after the hearing for the judge to get something that he asked for at the hearing is clearly appropriate to be included in (f).

QUESTION: May I ask this? Do you agree that if the judge decides not to hold a hearing, to take the



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matter on briefs, that there is a duty to make a prompt disposition?

MR. CLEGG: Well, this, I think, is also discussed in our brief, around Page 23. Our position is that in that situation, too, the effect of the word "prompt" is really to tie in Section (f) and Section (j). By prompt disposition, it means --

QUESTION: It means 30 days.

MR. CLEGG: That's right. That's right. That is the end result, that once he has gotten everything, he's got 30 days, and that that is what prompt disposition refers to.

QUESTION: That surely doesn't mean that if he takes it on brief, it must be resolved within 30 days of the time the motion is filed.

MR. CLEGG: No, it is 30 days within the time that he receives everything that he needs to rule on the motion.

QUESTION: The motion is filed, and supported by memorandum of law, and there is a response to the motion, and it is supported by -- and right then if the judge isn't going to have a hearing, the time starts to run, doesn't it?

MR. CLEGG: You are talking about in this particular case.

QUESTION: I am talking in a hypothetical case where he doesn't have a hearing, he just -- his practice is to have motions supported by memoranda on either side, and not to have a hearing unless he calls for it.

MR. CLEGG: Well, in that case, yes, once he has received everything that he needs to rule on the motion, then Subsection (j) will kick in, and --

QUESTION: I suppose within the 30 days, before the 30 days runs, he could say, I need something else, or I am going to have a hearing.

MR. CLEGG: Yes, that's right.

QUESTION: What if at the time all the papers are submitted to him and he is not going to hold a hearing, he says, I have 15 other motions under advisement right now, I just can't get to this one right away, so he says, I will delay submitting it for 30 days, and at the lapse of the 30-day period he says, now the motion is submitted? Can he do that?

MR. CLEGG: I think, yes, he could, but in that situation I think it would be more appropriate to get an ends of justice continuance under (h).

QUESTION: But you are saying he wouldn't violate the Speedy Trial Act if he did that, that the time would not start running until he actually anncunced that it was submitted rather than the time at which he



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had received all the papers.

MR. CLEGG: Well, I think that in order to avoid violating the Speedy Trial Act in that situation, he probably would have to state his reasons for not being able to rule on it within 30 days.

In short, the interpretation of the statute urged by the government is borne out by its plain language and the legislative history, and it ensures that the Act will remain workable. Petitioners' construction, on the other hand, is at odds with both the language and the history of the Act.

Moreover, their standard will make it very hard for the Act to work. It makes it impossible for courts and the prosecution to know how much time is on the clock at any given point, and will necessitate a great deal of needless appellate review, and will discourage trial courts from considering pretrial motions carefully.

Accordingly, the decision of the Ninth Circuit is correct and should be affirmed.

Any other questions? Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Ms. Anton?

ORAL ARGUMENT BY DENISE ANTON, ESQ.,

ON BEHALF OF THE PETITIONRS - REBUTTAL



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MS. ANTON: Briefly.

CHIEF JUSTICE BURGER: You have four minutes remaining.

MS. ANTON: Petitioners are not asking that the courts rule precipitiosly on motions. I think it is important in the context of this case that we realize what occurred prior to the pretrial motion. In this case, the motion asking for evidentiary hearing was filed November 24th, 1980, the motion that dealt with the telephone toll ecords.

The hearing was held four months later. At that hearing, for the first time the government said, I would like to try to obtain these toll records in response to your motion. The government then waited not two months, but three months in order to provide those toll records.

I do not think this is reasonable, and under the government's interpretation, the prosecutor in this particular case could have waited in fact three years.

QUESTION: Well, when they furnished that information at the end of 60 days, at least they presented an explanation as to what had delayed them.

MS. ANTON: At the end of 90 days Yes, but she did not present an explanation as to why she waited four months before even deciding to obtain them. The



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issue was filed in November of 1980. And then -- and she had already presented her response in February of 1981. The court could have ruled based on her previous response, and in fact the court didn't ever rule on this issue until May of 1982.

QUESTION: Well, do you take any major exception to the government's chronology of what has happened in its statement of the case, in its brief?

MS. ANTON: I have a few problems with a few dates, but nothing --

QUESTION: Nothing major?

MS. ANTON: Nothing major. I think it is similar to the facts that we set forward. I do take exception to certain of the statemkents they make as far as what occurred in the March 25th hearing, but I think I address those in our reply brief.

I would just like to address the question of whether this entire case rests on whether the prompt language applies to hearings or just to other dispositions. I think that the language of the statute could not be clearer that the hearing ends at the time -- I mean, that the exclusion ends at the time of the hearing, and in this case even if you assume that that means at the point at which all post-hearing briefs have been filed, that point is in July of 1981.

The briefs that were filed in December of 1981 related to a totally different issue, and was not an issue that was argued at the March 25th hearing. So even if you say that the hearing continues on until the last post-hearing memoranda is filed, that point is in June or July, not in December, 1981.

QUESTION: Yes, but then you've got another motion, don't you.

MS. ANTON: Not until September.

QUESTION: Right.

MS. ANTON: There is a period between the filing of the last memoranda and September.

I think that the government's argument that the language is plain on its face and then that prompt does not mean prompt, and it does not mean that the parties have any obligation to file their papers with any speed, and that hearing does not mean hearing, but the point at which post-hearing memoranda are filed is not a plain interpretation of the language.

I think that any ambiguity is being created by the government's interepretation of the language, and to no ends that I can see. I don't believe that it is necessary that this broad interpretation be adopted in order to ensure that the system will work efficiently. If anything, the only way that the system can work



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efficiently is if the courts are required to monitor their cases and are required to only continue cases if there is a reason to do so.

CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

(Whereupon, at 2:37 o'clock p.m., the case in the above-entitled matter was submitted.)



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